

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH CORNELL STINSON,

Defendant-Appellant.

UNPUBLISHED

June 26, 2003

No. 229139

Genesee Circuit Court

LC No. 99-005195-FC

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to commit great bodily harm less than murder, MCL 750.84,¹ carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 100 to 240 months for the assault conviction, and 43 to 120 months for the CCW conviction, to be served consecutive to a two-year term for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions, but remand for correction of the felony-firearm sentence.

In a separate, but related case, defendant was charged with murdering his former girlfriend's mother, Debra Green, in a botched attempt to kill his former girlfriend. In this case, defendant was accused of shooting Terrance Rawls because Rawls refused to shoot the former girlfriend. Rawls testified that defendant, a childhood acquaintance, asked him to kill defendant's former girlfriend. Defendant arrived at Rawls' home one evening and accused Rawls of trying to sell a Tech Nine gun that had been stolen from him. Rawls left his house with defendant and another man, believing they were going to see a car. Instead, Rawls was driven to a beach area. Defendant demanded to know why Rawls would not kill defendant's former girlfriend, then shot Rawls in the stomach, hip, and arm.

A police officer testified that when he first arrived at the beach, Rawls told him that he had been kidnapped and shot by two unknown men. An officer who talked to Rawls at the hospital confirmed that Rawls denied knowing who had shot him, but recognized that Rawls was

¹ Defendant was charged with assault with intent to commit murder, MCL 750.83, but was convicted of the lesser offense.

somewhat incoherent when they spoke. At trial, Rawls testified that he identified defendant as the shooter to police who arrived on the scene, but admitted that he lied about being kidnapped from a store. At defendant's murder retrial involving victim Debra Green, Rawls recanted his testimony identifying defendant as the shooter in this case. However, at the second retrial for the murder of Debra Green, Rawls testified that defendant shot him and that he lied during the first retrial. This Court granted defendant's request for remand for an evidentiary hearing. Following the hearing, the trial court held that the credibility of Rawls' testimony was at issue and explored at trial by the defense. Specifically, the trial court noted the disparity between Rawls' testimony regarding his identification of defendant at the scene and police officers' testimony that he did not initially identify defendant as the shooter. Thus, the jury had to assess Rawls' credibility at trial and accepted his testimony. The trial court concluded that contradictions in testimony "had been 'washed out,'" and the conflicting testimony at the two murder trials did not provide a basis for a new trial.

I. Motion for New Trial/Newly Discovered Evidence

Defendant first argues that the trial court should have granted his motion for a new trial based on newly discovered evidence that Rawls, who was the principal witness against him, recanted his incriminating testimony at a murder trial on the related charge. We review the trial court's decision for an abuse of discretion. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

In the first murder trial, Rawls testified about admissions defendant made about killing Debra Green, and Rawls stated that defendant shot him for refusing to assist. The trial resulted in a hung jury. Subsequently, in the present assault case, Rawls testified in June 2000, that defendant shot him. Defendant was tried a second time for murder. In the second murder trial, Rawls testified in May 2001, that defendant did *not* shoot him. That trial also ended in a hung jury. Relying on this testimony, defense counsel moved this Court for an evidentiary hearing to seek a new trial based on Rawls' "newly discovered" recanted testimony. Shortly before the remand hearing in circuit court, a third murder trial was conducted. This time, Rawls recanted his recantation and again testified that defendant had shot him.

At the evidentiary hearing on remand from this Court, Rawls testified that defendant shot him and claimed that he lied at the second murder trial when he denied defendant's involvement. Rawls testified that he only committed perjury on one occasion, during the second murder trial. Rawls admitted contacting the prosecutor because he would not be released on parole if perjury charges were brought against him. However, Rawls acknowledged that he was not given a deal by the prosecutor and no promises were made to him. Rawls testified that he told the truth based on the advice of his grandmother, although he had not followed that advice during the second murder trial. The circuit court denied defendant's motion for a new trial, holding that evidence of perjury was cumulative to other credibility evidence produced at trial.

We cannot conclude that the trial court abused its discretion. *Mechura, supra*. "A motion for a new trial based on newly discovered evidence may be granted upon a showing that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial." *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). Rawls' contradictory testimony in two

other trials that defendant did not shoot him was cumulative to evidence adduced at this assault trial. Rawls' credibility was at issue during this assault trial. He told investigating officers that he had been kidnapped by two unknown men and did not know who shot him. Through cross-examination by defendant, Rawls was impeached with evidence of prior convictions, drug use,² and inconsistent statements he had given the police about how many times he and defendant discussed killing defendant's former girlfriend, and where those conversations occurred. More importantly, defendant persistently cross-examined Rawls about inconsistencies between his trial testimony and testimony given under oath at other official proceedings, such as the preliminary examination. Confronted with obvious inconsistencies, Rawls testified that he could not "remember" whether he had lied in those other hearings. Defense counsel skillfully weaved those inconsistencies into his closing argument to the jury and noted that Rawls was "a person not adverse to lie or create facts." While Rawls' changing testimony in the second and third murder trials would be added ammunition for defendant's attack on Rawls' honesty, its function as "*added*" ammunition demonstrates its *redundant* nature.

Further, the trial court was in a position to assess Rawls' credibility when he recanted his recantation. In essence, Rawls' contrasting stories under oath created a washout. *People v Bradshaw*, 165 Mich App 562, 567; 419 NW2d 33 (1988). Recantation testimony is generally considered suspect and untrustworthy. *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977). Based on the proofs in this matter, we cannot say that the trial court abused its discretion when it denied defendant's motion for a new trial. *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992).³

II. Consecutive Sentencing

Defendant next argues that the trial court erred by ordering his felony-firearm sentence to be served consecutive to his CCW sentence. The prosecutor concedes that the trial court erred. Accordingly, we remand for modification of the judgment of sentence to reflect that defendant's sentences for CCW and felony-firearm are to be served concurrent to each other.⁴

III. "Bad Acts" Evidence/Effective Assistance of Counsel

We now turn to the issues raised in defendant's brief filed *in propria persona*. Defendant argues that he was denied a fair trial when the trial court allowed evidence of prior bad acts committed by defendant – namely, the killing of Debra Green and an assault upon his former girlfriend. "Bad acts" evidence was restricted in scope by a pretrial order. Defendant also argues that he was denied the effective assistance of counsel because counsel failed to object when the prosecutor used the "bad acts" evidence in a manner that exceeded the scope of the pretrial order.

² We offer no opinion whether drug use is an appropriate basis for impeachment.

³ Defendant's situation is clearly distinguishable from *People v Cress*, 250 Mich App 110; 645 NW2d 669, vacated and remanded on other grounds 466 Mich 882 (2002), where key witnesses recanted *and* another man confessed to the crime.

⁴ The felony-firearm sentence remains consecutive to defendant's sentence for assault with intent to do great bodily harm less than murder.

Upon motion by the defense, the trial court applied the four-prong test of *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993),⁵ and ruled that evidence of Debra Green's murder would be admissible to explain why defendant shot Rawls, but that the details of how the killing was effectuated was "probably not relevant" and that the court "may need to limit how" the prosecutor could proceed. The prosecutor offered a stipulation about the time and location of the killing, and the court specifically told defense counsel to mention any other limitations he thought would be needed. Defendant agreed to the stipulation.

Defendant now argues that the scope of the pretrial order was exceeded when (1) the prosecutor elicited from defendant's former girlfriend that defendant had threatened to kill her and her mother, and (2) the prosecutor elicited from Terrance Rawls that defendant had been a suspect in Ms. Green's murder and that defendant had told him that Ms. Green was the unintended target of the bullet that killed her.

To establish ineffective assistance of counsel, a defendant must make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973), unless the details of the alleged deficiencies are apparent on the existing record. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987). Here, defendant did not make a testimonial record.

On the present record, it is not apparent that counsel erred by failing to object. The trial court intended to keep out any unduly prejudicial details of Ms. Green's death. The pretrial order does not appear to have been intended to prevent any reference to a connection between that death and defendant. Evidence of defendant's altercation with his former girlfriend was also properly admissible because it showed why defendant was motivated to shoot Rawls. See *People v Johnson*, 113 Mich App 650, 660; 318 NW2d 525 (1982) (prior bad acts can be used to show a defendant's intent or motive). The existing record does not demonstrate that counsel's performance was so deficient that it denied defendant the effective assistance of counsel. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

IV. Effective Assistance of Counsel

Defendant also asserts that he was denied the effective assistance of counsel because counsel (1) failed to object when the prosecutor "vouched" for the credibility of a witness; (2) failed to object when the prosecutor argued facts not in evidence; and (3) failed to properly present an alibi defense because he did not call two "critical" witnesses and did not enter into evidence a receipt showing that one of defendant's cars was in a repair shop at the time of the shooting. Again, we note that defendant did not conduct an evidentiary hearing under *Ginther*, *supra*. It is not apparent from the existing record that counsel's performance was deficient. *Pickens*, *supra*.

V. Great Weight of the Evidence

⁵ Under *VanderVliet*, other acts evidence must be offered for a proper purpose; it must be relevant; its probative value cannot be substantially outweighed by its potential for unfair prejudice; and a cautionary instruction must be given if requested. *VanderVliet*, *supra* at 74-75.

Finally, defendant argues that his convictions are contrary to the great weight of the evidence. The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). This issue was not preserved by a motion for a new trial. See *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987).

Because defendant failed to preserve this issue, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Plain error was not established. The verdicts were supported by Rawls' testimony, although his credibility was challenged. Nonetheless, the jury was in a better position to judge Rawls' credibility, and, on this record, we cannot say that Rawls' testimony was deprived of all probative value or that the jury could not have believed it. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998).

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood